

IFW

Docket No. 420-002

Patent

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of :
CHRISTOPHER S. NOLAN : Examiner Fox
Serial No.: 09/684,032 : Group Art Unit 3652
Filed: October 6, 2000 :
For: **LINER FOR CONTAINER** :
WITH SIDE DOOR :

PETITION UNDER 37 C.F.R. §1.144

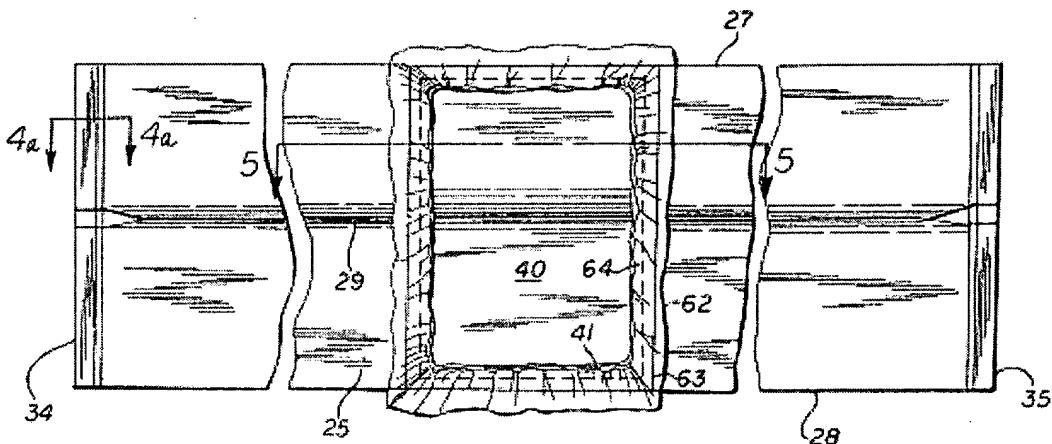
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Sir:

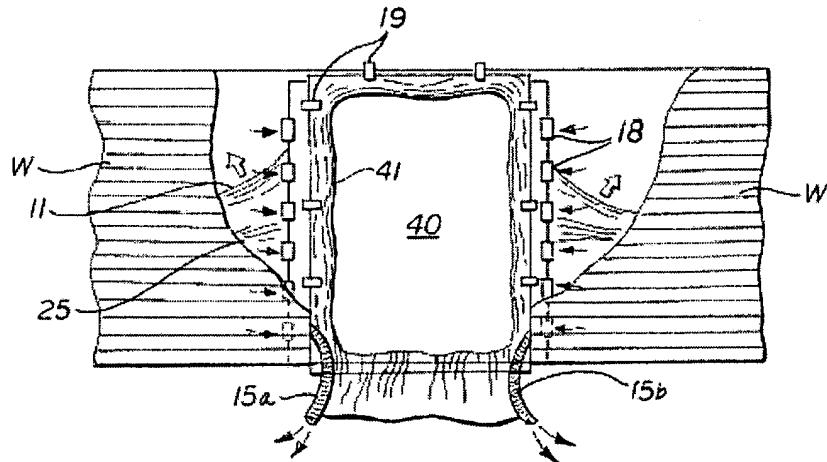
Applicant hereby Petitions the Director of the U.S. Patent and Trademark Office to review the Examiner's *sua sponte* decision to withdraw claims 12, 14, 16, and 18-20 from consideration in the final Office Action mailed June 16, 2004. A timely Request for Reconsideration traversing the restriction was filed on August 16, 2004, but the Examiner made his decision final in an Office Action mailed September 10, 2004 without providing proper reasons for it. This Petition follows within one month of the filing of the Request for Reconsideration, and is thus considered timely under 37 C.F.R. § 1.181(f). No fee is believed due pursuant to 37 C.F.R. § 1.181(d).

FACTS

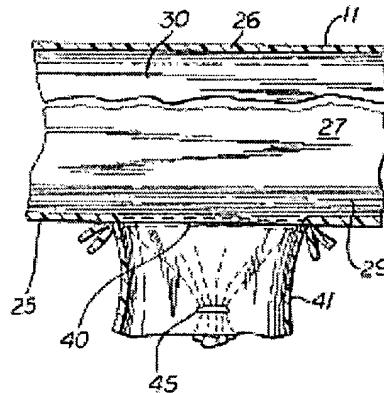
As background, the present invention pertains to moisture proof liners for containers and, more particularly, to a liner and the related installation system where transfer of the cargo into and out of the container is through a side door. In its broadest terms, the invention includes an liner 11 formed of impervious film having a first, elongated side panel 25, an opposite side panel 26, a top panel 27, a bottom panel 28, and first and second end panels 34 and 35:



An access opening 40 is formed in at least the one side panel 25, such as for example by cutting, and is adapted for loading and unloading cargo from the side of the liner:



Independent claim 1 relates specifically to the liner 11 comprising four elongated panels 25, 26, 27, 28 of impervious film adapted to substantially match the elongated sides, top, and bottom of a container 10 (as shown in Figure 4, supra). First and second end panels 34 and 35 complete the liner (also Figure 4). The liner 11 also comprises an access opening 40 along at least one side panel adapted for loading and unloading cargo (Figure 2, supra). A closure 45 is also claimed for sealing the opening 40:



Claim 2 adds an open tube 41 attached at one end to extend laterally from the opening

to form a passage for loading and unloading cargo (Figure 5; p. 9, line 11). Claim 3 adds to claim 2 the condition that the liner and tube are formed of plastic sheet (p.8, line 15) and that a heat seal bead 64 extends around the orifice between one side panel and the adjacent one end of the tube 41 (Figure 4; p. 11, line 12). Claim 4 adds a tie closure 45 formed around the tube 41 and adapted to be tucked inside the container after loading (Figure 5; p.9, line 21). Claim 5 adds the requirement that the access opening 40 is located at approximately the mid-point of one of the side panels 25 (Figure 1; p. 10, line 1).

Claim 6 requires that the liner in claim 1 include a second access opening 40a, a tube 41a in the second side panel substantially opposite the first opening, and a closure 45a for the second opening for loading/unloading cargo (Figure 3; p. 10, line 8).

Claim 7 adds the requirement of gussets 29, 30 thereby allowing expansion for substantially filling the container when the panels are fully extended (Figures 4 & 5; p. 8, line 22). Claim 8 adds the requirement that the first and second end panels 34,35 are formed by folded end sections and a heat seal bead 60 extending across the folds of the end sections (p. 10, line 22).

Independent claim 9 relates to a method of installing a moisture proof liner for an elongated container, including the step of providing a liner 11 having four elongated panels of impervious film adapted to substantially match the elongated sides 25, top 27 and bottom 28 of the container. The liner 11 also includes first and second end panels 34,35. The

method further includes the step of cutting an access opening 40 along at least one side panel 25 adapted for loading and unloading cargo, as well as the step of positioning the liner 11 in the container. The method involves erecting the liner to substantially fill the container, transferring cargo through the opening, and closing the opening to seal the liner and protect the cargo (Figures 4 & 5; p. 10, line 14).

Claim 10 adds the requirement to claim 9 that the method include the step of attaching an open ended tube 41 to the one side panel to mate with the opening 40 (p.9, line 12). Additionally, the method of claim 10 includes passing cargo through both the tube 41 and the opening 40 during cargo transfer (p. 9, line 13). Claim 11 adds the step of holding open the free end of the tube overhead by lifting the upper corners and providing protection from inclement weather during cargo transfer (p. 9, line 15).

After considering the application as filed, the Examiner issued a first Office Action rejecting all claims as anticipated by a single prior art reference. This Action was unfortunately lost in the mail, and upon learning of this fact during a routine audit, Applicant timely petitioned for unintentional abandonment of the application and submitted a response traversing the rejections. In response, the Examiner conceded that all anticipation rejections were improper, but reverted by rejecting the claims on obviousness grounds over the same reference cited in the original anticipation rejection. Applicant again traversed the rejection, but the Examiner remained steadfast and issued a final Office Action.

Applicant then instituted an appeal, filing a detailed Appeal Brief challenging the Examiner's final rejection of the original claims on obviousness grounds in view of the previously admitted deficiencies of the reference. Instead of submitting a timely Answer, the Examiner instead issued an Action reopening prosecution and curiously reinstating the previously challenged and withdrawn anticipation rejections. In a timely Amendment document (copy attached as *Exhibit A*), Applicant traversed the anticipation rejections for the second time.

Additionally, Applicant also presented new claims 12, 14, 16, and 18-20, all of which are directed to a liner for a container with a side door or a related installation method. For the most part, these new claims depend from and are thus narrower than the original claims, and were presented in an effort to reach an agreement regarding the existence of allowable subject matter in light of additional distinctions noted between the Applicant's disclosed invention and the prior art reference relied upon by the Examiner. Applicant's hope was to obviate the need for pursuing the extant appeal.

Instead of acting on these new claims, the Examiner *sua sponte*, and without providing a proper reason as required by the pertinent rules and precedential decisions of this Board, held the new claims withdrawn. The Examiner posited that "the state of the liner art has two well known species of liners, free standing pneumatically deployed liners and those that are manually deployed," and further opined that Applicant had "constructively elected" the

original claims (which are generic to both freestanding and pneumatically deployed liners). Despite requesting reconsideration, the Examiner simply repeated this reason in an Office Action issued September 10, 2004. This Petition is being filed along with a Request for Continued Examination challenging the Examiner's rejections of the original claims.

ARGUMENT

The primary basis for this Petition is the lack of any support for the Examiner's contention that claims 12, 14, 16, and 18-20 are each "directed to an invention that is independent or distinct from the invention originally claimed." As observed in the Manual of Patent Examining Procedure (MPEP), "[t]here are two criteria for restriction between patentably distinct inventions: (A) The inventions must be independent . . . or distinct . . . ; and (B) There must be a serious burden on the examiner if restriction is required." MPEP § 803.01 (8th ed. May 2004). In addition to reciting in detail the standards to be applied in assessing whether restriction is warranted, the MPEP counsels that "Examiners must provide reasons and/or cite examples to support conclusions . . ." reached regarding restriction. *Id.* The requirement for a proper showing remains intact even when claims are added to an application already under examination. Specifically, Section 1.145 of the Code of Federal Regulations provides that:

If, after an office action on an application, the applicant presents claims directed to an invention *distinct from and independent of* the invention previously claimed, the applicant will be required to restrict claims to the invention previously claimed if the amendment is entered, subject to

reconsideration and review as provided in §§ 1.143 and 1.144.

37 C.F.R. § 1.145 (emphasis added); *see also In re Kase*, 71 USPQ2d 1063 (Com'r of Patents 2004) (unpublished) (on Petition to the Commissioner of Patents, holding an Examiner's withdrawal of newly presented claims improper because “[n]o reasons are given to show why the newly presented claims are independent and/or distinct . . .”).

Here, the Examiner's restriction and withdrawal of claims 12, 14, 16, and 18-20 is premised on the allegation that “the state of the liner art has two well known species of liners, free standing pneumatically deployed liners and those that are manually deployed.” This unsupported contention does not provide a proper basis for the conclusion that the newly presented claims cover an invention “independent and/or distinct” from the invention previously claimed, which requires the application of multi-part criteria and citation to valid reasons or examples supporting the conclusions reached. *See MPEP §808 (8th ed. May 2004)* (“Every requirement to restrict has two aspects: (A) the reasons (as distinguished from the mere statement of conclusion) why the inventions *as claimed* are either independent or distinct; and (B) the reasons for insisting upon restriction therebetween . . .”). Simply pointing out the differences in the inventions being claimed is inadequate. Moreover, the assertion that Applicant “constructively elected” the invention previously claimed does not and cannot serve as a substitute for the requisite showing of an independent and distinct invention using the longstanding tests enumerated in the MPEP. Indeed, if an Applicant is

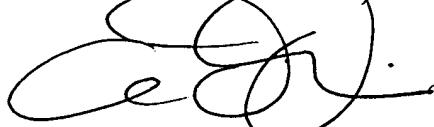
considered to have “constructively elected” examination of original or previously presented claims each time new claims are presented, this would render meaningless the requirement of Section 1.145 for a showing that the invention is independent and distinct before restricting newly presented claims.

Additionally, it has not been adequately shown that examining any of claims 12, 14, 16, and 18-20 creates a “serious” burden on the Examiner. Liners for containers with side doors, whether erected using air, manually deployed, or free-standing, do not require separate classification or a separate field of search. MPEP §808.02(A) and §808.02(C) (8th ed. May 2004). The Examiner cites no patents indicating separate status in the art or the need for a different field of search. MPEP §808.02(B) (8th ed. May 2004). Furthermore, Section 803.01 of the MPEP explains that “[i]f the search and examination of an entire application can be made without serious burden, the examiner must examine it on the merits, ***even though it includes claims to independent or distinct inventions***” (emphasis added).

In light of the foregoing, Applicant respectfully Petitions the Director or his designee to review the Examiner’s restriction, find it unsupported, and order claims 12, 14, 16, and 18-20 reinstated. In the event it is determined that any fee is due, authorization is given to debit it from Deposit Account 11-0978.

Respectfully submitted,

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AMENDMENT

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Sir:

This document is submitted in response to the Office Action mailed December 16, 2003. It includes **Claim Amendments** reflected in the listing of claims beginning on page 2 of this paper. **Remarks** follow the Claim Amendments.

CLAIM AMENDMENTS

1. (Original) A moisture proof liner for an elongated container for use in shipping cargo, comprising:

four elongated panels of impervious film adapted to substantially match the elongated sides, top and bottom of said container;

first and second end panels to complete said liner;

an access opening along at least one side panel adapted for loading and unloading said cargo; and

a closure for said opening to seal said liner against moisture to protect the cargo.

2. (Original) The liner of Claim 1, wherein said access opening includes an open tube attached at one end to extend laterally from said opening to thereby form a passage for loading and unloading said cargo.

3. (Original) The liner of Claim 2, wherein said liner and said tube are formed of plastic sheet and a heat seal bead extending around said orifice between said one side panel and the adjacent one end of said tube.

4. (Original) The liner of Claim 3, wherein said closure is formed by a tie around the tube adjacent the other end and adapted to be tucked inside said container after loading.

5. (Original) The liner of Claim 1, wherein the access opening is approximately at the mid-point of said one side panel.

6. (Original) The liner of Claim 1, wherein is provided a second access opening including a tube in the second side panel substantially opposite the first opening for also loading/unloading said cargo and a second closure for said second opening.

7. (Currently Amended) The liner of Claim 1, wherein the side panels include gussets folds to allow expansion for substantially filling said container when said panels are fully extended.

8. (Currently Amended) The liner of Claim 7, wherein said first and second end panels are formed by folded end sections of the gusseted side panels and a heat seal bead extending across ~~the gussets~~ the folds of said end sections.

9. (Original) A method of installing a moisture proof liner for an elongated container for use in shipping cargo, comprising the steps of:

providing said liner having four elongated panels of impervious film adapted to substantially match the elongated sides, top and bottom of said container and first and second end panels to complete said liner;

cutting an access opening along at least one side panel adapted for loading and unloading said cargo;

positioning said liner in the container;

erecting the liner to substantially fill the same;

transferring said cargo through said opening; and

closing the opening to seal said liner against moisture to protect the cargo.

10. (Original) The method of installing a liner of Claim 9, wherein is further provided the step of:

attaching an open ended tube to said one side panel to mate with the opening; and

passing said cargo through both said tube and said opening during transfer.

11. (Original) The method of installing a liner of Claim 10, wherein is further provided the step of:

holding open the free end of said tube overhead by lifting the upper corners and for protection from increment weather during cargo transfer.

12. (New) The liner of claim 1 in combination with a source of air for erecting the liner.

13. (New) A liner for an elongated container for use in shipping cargo, comprising: four elongated panels of impervious film adapted to substantially match the elongated sides, top and bottom of said container, each of said elongated panels having a first length;

first and second end panels to complete said liner, each of said first and second end panels having a second length less than the first length; and

an access opening along at least one side panel adapted for loading and unloading said cargo.

14. (New) The liner of claim 13, wherein said liner is free-standing when erected in said container.

15. (New) The liner of claim 13, wherein said first and second end panels are free of any openings.

16. (New) The liner of claim 13 in combination with a manifold including a plurality of orifices for enabling installation of the liner via air pressure.

17. (New) A liner for an elongated container for use in shipping cargo, comprising:
elongated top, bottom, first side and second side panels of impervious film
adapted to substantially match the elongated top, bottom and sides of said container;
uninterrupted first and second end panels free of any openings to complete said
liner;

a first access opening along said first side panel adapted for loading and
unloading said cargo; and

a second access opening along said second side panel substantially opposite
said first opening for also loading and unloading said cargo.

18. (New) The liner of claim 17, wherein said liner is free-standing when erected
in said container.

19. (New) A method of installing a liner for an elongated container for use in
shipping cargo, comprising the steps of:

providing said liner having four elongated panels of impervious film adapted
to substantially match the elongated sides, top and bottom of said container and first and
second end panels to complete said liner;

forming an access opening along at least one side panel adapted for loading and
unloading said cargo; and

positioning said liner in the container such that said liner is free-standing.

20. (New) The method of installing a liner of Claim 19, wherein the positioning step includes using air to erect the liner.

REMARKS

Applicant has carefully reviewed the Office Action mailed December 16, 2003 and expresses disappointment with the Examiner's decision to reopen prosecution to reinstate a previously withdrawn anticipation rejection, seemingly in contravention of the goal of avoiding "piecemeal" examination expressed in Section 707.07(g) of the Manual of Patent Examining Procedure.

In response to the reinstated objection to the drawings, it is noted that the issue raised was squarely addressed in detail in a response to the first Office Action, and the Examiner did not repeat the objection in the subsequent final Office Action. Under Section 707.07(e) of the Manual of Patent Examining Procedure, this led Applicant to believe that the requirement had been withdrawn or waived, especially since the drawings do indeed show the claimed gussets. Nevertheless, to obviate further contention on this trivial issue, claims 7 and 8 are amended as set forth above to eliminate reference to "gussets" and instead refer to "folds" (which are plainly shown in the drawings as comprising the gussets).

Turning to the substantive issues, Applicant respectfully traverses the "new" rejections of claims 1, 2, 4-6, 9, and 10 as allegedly being anticipated by U.S. Patent No. 3,951,284 to Fell et al. First of all, the stated anticipation rejections ignore limitations in the claims. For example, the rejection made at the top of page 3 of the Office Action ignores the requirement in claim 1 of "elongated" panels. Furthermore, the contention is made that the reference discloses an "access panel," when the claim actually requires an "access opening."

Accordingly, the Examiner has not shown with the requisite strict identity that each and every limitation of the claim is met, which is of course an unwavering requirement for maintaining an anticipation rejection.

The reason for this “oversight” is clear. The Fell et al. patent simply does not disclose “an access opening along at least one [elongated] *side panel* adapted for loading and unloading said cargo.” Rather, it merely shows the conventional opening formed in the *end panel* of the liner. On page 5 of the Action, the Examiner *expressly acknowledges* this fact by stating, “. . . Fell et al. do not explicitly teach the opening in the side of the liner. . . .,” yet then surprisingly attempts to assert otherwise by making an anticipation rejection of claim 1 based on this patent. Similarly, independent claim 9 requires “cutting an access opening along at least one [elongated] *side panel* . . . ,” which the Examiner concedes that the Fell et al. patent does not disclose. Accordingly, prosecution was ostensibly reopened to state rejections that the Examiner’s own remarks admit are untenable and unsupported.

With regard to the obviousness rejection of claims 1, 2, 4-6, 9 and 10 over the Fell et al. patent, it is submitted that it is deficient for several reasons. First of all, Section 2143.01 of the Manual of Patent Examining Procedure provides that “[i]f the proposed modification . . . of the prior art would change the principle of operation of the prior art invention being modified, *then the teaching . . . [is] not sufficient to render the claims prima facie obvious.*” (emphasis added). In this instance, modifying the liner in the proposed

manner would “change the principle of operation” of the “prior art invention” disclosed in the Fell et al. patent, which at col. 7, ll. 47-48 explains that “[o]nce the container has reached its destination ***some means must be provided to tilt the container.***” (emphasis added). Moreover, this patent teaches that “. . . as the container empties it is tipped to allow the bulk material to flow down ***towards the unloading end of the liner***” (col. 8, ll. 4-6, emphasis added).

From the foregoing, it is clear that the inventors only contemplated having an opening in the end of the liner, not in the side panel of the liner as required by claims 1 and 9 (even if their patent attorney intended to leave open the possibility of asserting infringement if the opening is placed in a different panel of the liner). Furthermore, modifying the liner as proposed would not allow for the desired “flow” of materials discussed in the Fell et al. patent. Even if a corresponding container, such as a rail car, was capable of tilting on its side, the contents of the container would not flow to the unloading *end* of the liner. Instead, only a portion of the contents would exit the side opening of the container, while the remainder would be pressed against the side wall of the container. Since the proposed liner modification would dramatically change the operation of “prior art invention” disclosed in the Fell et al. patent, it is believed that the *prima facie* case of obviousness is lacking.

Additionally, the passage cited by the Examiner as allegedly suggesting the proposed modification merely states that “. . . there is provided a device for transporting bulk material

in a shipping vehicle **having walls, one of which defines a door opening** and doors attached thereto. . . ” (emphasis added). Rather than suggesting that “the door to the container can be in any of the walls to the container,” this passage merely states that one of the **walls** defines a **door opening**. To stretch this passage as proposed would *require* the entire elongated side wall of the container “define” a door opening. Not only would this result in a structurally unsound container, but it would render the Fell et al. patent inoperable. In particular, if the entire side wall defines the door of the container, portions of the liner would simply fall out of the container when it is tilted, as **must** be done for emptying the contents of the container according to the Fell et al. patent. Clearly, this is not the end result desired by this patent, which teachings must be construed in *pari materia* rather than in the piecemeal approach taken by the Examiner. See M.P.E.P. Section 2141.03 (“**A prior art reference must be considered in its entirety**, i.e., as a whole, including portions that would lead away from the claimed invention.”) (emphasis added).

As has been pointed out in several communications to no avail, the rejections of the several of the dependent claims are also deficient. For example, claim 5 requires that the opening is along the mid-point of one of the elongated side panels. Since it is conceded that the Fell et al. patent does not even teach providing such an opening in a side panel, it certainly cannot teach or suggest providing it at a mid-point of the panel. Moreover, even if the opening in the liner disclosed in the Fell et al. patent were provided at the mid-point

of the end panel, it is emphasized that this liner would not work in a container with a side door, since the elongated sides of that liner would not “substantially” match the corresponding sides of the container (especially since the liner 20 disclosed is only of “3/4” height; see col. 5, lines 38-39). Even assuming for the sake of argument that the reference would lead a skilled artisan to place the opening in the elongated side panel (which is not conceded), nothing would motivate one to provide it at the midpoint.

As for claim 6, the contention made in support of unpatentability is that the Fell et al. patent teaches “access openings for containers having openings on one or more sides depending on the configuration of the container.” However, the Examiner fails to cite to any portion of the document as supplying this teaching. Applicant’s Counsel scoured this reference, but finds that it is limited to providing one or more access openings on a *single end panel* of a liner. It simply does not contemplate providing openings in a second side panel substantially opposite the first opening, as expressly required by the claim. This is because the Fell et al. liner is intended for use on a trailer or other container including doors on only a single end. Thus, it certainly cannot “suggest” this modification, and no other convincing line of reasoning is provided as to why a skilled artisan would want to provide a second opening at the opposite end of the liner disclosed in the Fell et al. patent, when the opening would simply face the end wall of the trailer near the cab, which is *always* closed.

The Examiner makes a "new" rejection of claim 7 based on the combination of the Fell et al. patent and the Krien '197 patent (which incidentally is owned by the Applicant). Again, the rejection made plainly ignores what is actually required by this claim, and is thus fatally deficient.

New claims 12-20 are also presented for consideration, all of which are believed to be directed to subject matter supported by the original specification and drawings. New claim 12 recites the liner of claim 1 in combination with a source of air for erecting the liner, such as the blowers 15b, 16b shown in Figure 1. Since the liner in the Fell et al. patent is erected in a completely different fashion (see col. 4, lines 42-53), no corresponding structure is present. Consequently, the claim is directed to allowable subject matter.

New independent claim 13 recites a liner for an elongated container for use in shipping cargo comprising four elongated panels of impervious film adapted to substantially match the elongated sides, top and bottom of the container, with each elongated panel having a first length. First and second end panels complete the liner, each having a second length less than the first length, and an access opening is formed along at least one side panel adapted for loading and unloading the cargo. The Fell et al. patent plainly does not disclose, teach, or suggest providing a liner with a "longer" side panel having an access opening and "shorter" end panels, as is claimed. Hence, it cannot anticipate or render the claimed invention obvious.

Dependent claim 14 requires that the liner is free-standing when erected in said container. The liner 20 shown in the Fell et al. patent includes tabs 35, each of which is "connected to a hook 26 by means of a stretchable connector 37" associated with the container. The liner 20 is thus not free-standing.

Dependent claim 15 requires that the first and second "shortened" end panels are free of any openings. The Fell et al. patent discloses the exact opposite arrangement. Thus, it certainly cannot anticipate or render obvious the invention of this claim.

Dependent claim 16 requires a manifold including a plurality of orifices for enabling installation of the liner via air pressure. Again, the liner 20 of the Fell et al. patent is suspended from the container using hooks and connectors. Consequently, no such manifold is provided.

Independent claim 17 recites a liner for an elongated container for use in shipping cargo comprising elongated top, bottom, first side and second side panels of impervious film adapted to substantially match the elongated top, bottom and sides of the container, along with uninterrupted first and second end panels free of any openings to complete the liner. A first access opening along the first side panel adapted for loading and unloading the cargo, and a second access opening along the second side panel substantially opposite the first opening for also loading and unloading the cargo. Regardless of the Examiner's position regarding where the opening is located, it must be conceded that neither the Fell et al. patent

nor any of the other cited references disclose, teach, or suggest providing multiple openings in different panels of a liner. Consequently, this claim is believed to be in condition for allowance.

Dependent claim 18 requires that the liner of claim 17 is free-standing when erected in the container. Again, the liner 20 in the Fell et al. patent is erected using a complicated arrangement of hangers, which is in stark and total contrast to the simplified approach proposed by the Applicant.

Finally, independent claim 19 reads on a method of installing a liner for an elongated container for use in shipping cargo comprising the steps of providing the liner with four elongated panels of impervious film adapted to substantially match the elongated sides, top and bottom of the container and first and second end panels to complete said liner, forming an access opening along at least one side panel adapted for loading and unloading the cargo and positioning said liner in the container such that the liner is free-standing. Dependent claim 20 then qualifies that the positioning step involves using air to erect the liner. None of these steps are taught or suggested by the Fell et al. patent.

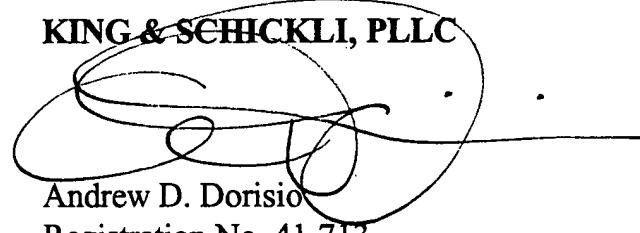
In summary, Applicant has addressed all issues raised in the Office Action. In particular, the manner in which claims 1 and 9 patentably distinguish over the Fell et al. patent has been explained convincingly and in detail. The independent patentability of several of the dependent claims is also established, as is the patentability of the new claims

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12-20. Since all claims are believed to be in condition for allowance, an early notice to this effect is earnestly solicited. However, if the Examiner finds that some minor issue has been overlooked, he is encouraged to contact the Applicant's Counsel at the number listed below in order to reduce costs and expedite the allowance of the application. Also, any fees due for processing this document may be debited from Deposit Account 11-0978.

Respectfully submitted,

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